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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 787

TRUST COMPANY OF CHICAGO, a corporation, as Administrator of the Estate of PETER ANASTIS,
Petitioner,

vs.

ERIE RAILROAD COMPANY, a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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OPINIONS BELOW.

This was an action for damages for wrongful death under the Federal Employers' Liability Act. The District Court granted defendant's motion made at the close of plaintiff's evidence to instruct the jury to find the defendant not guilty and judgment was entered accordingly (R. 43-45). The Circuit Court of Appeals for the Seventh Circuit in an unanimous decision affirmed the judgment of the District Court on the ground that there was a total failure of proof of negligence (R.65). The opinion of the Circuit Court of Appeals is reported in 165 Fed. (2d) 806.

RESTATEMENT OF THE CASE.

Petitioner's intestate, a foreman for many years, was working on tracks in a railroad yard, in the daytime, on a nice, bright day, near an engine standing on Track 1. He and five members of his gang had worked at the same place the day before (R. 27). They stopped work at 12:10 P. M. and started to go to a tool house about 1500 feet away to eat their lunch (R. 35). Petitioner's intestate walked about 200 feet west along Track 4 and then turned to his right and walked "to" Track 1 (R. 35, 36). The engine and 25 or 40 cars had entered the yards at no disclosed time (R. 34). It had, however, arrived before the deceased and his gang went to lunch and was standing there when they left (R. 32, 33). It is uncertain from the evidence in the record how the train got into the yard. Petitioner's witness, Theodore Plitsis, was the only one who testified on that subject. He first said that the train came from the east, going west, with the engine on the head end (R. 32). He later testified that when the train came inside the yard it was going east, with the engine headed east (R. 32, 33).

About thirty minutes after deceased started to go to the tool house for his lunch he was found dead between the rails of Track 1, 500 to 600 feet from the tool house. There is no evidence this engine moved between the time the section gang left their place of work to go to lunch and the time deceased was found. He was found lying on his back between the rails of Track 1. His head was towards the east. His right hand had been cut off and he had an injury in the back of his neck (R. 39). One witness said he saw no train on Track 1 and another that there was nothing in the yard when deceased was found (R. 26-39). How and in what manner the train disappeared is not disclosed.

One witness testified that while he was eating his lunch in the tool house and talking with the other members of his gang he did not hear anything (R. 38, 42). He said that all he was interested in was eating his lunch (R. 42).

There is no evidence in the record as to the movements of deceased after he got to Track 1, or how he travelled to the point where he was found, a distance of at least 1,000 feet from the standing engine. There is no evidence when, how or under what circumstances he was killed. There is no evidence that he could have been seen in time to prevent the accident. There is no evidence that he had any duty to perform at the place of the accident. On the assumption that the engine moved, there is no evidence that the engine crew could have seen him or that the engine crew had any reason to know that he might be on the tracks or that he had any duty to perform at that place. There is no evidence of any probative effect that if the engine moved no bell or whistle was sounded. There is no evidence that there was anything wrong with the tracks or roadbed where deceased was found. There is no evidence that he was inspecting the tracks or roadbed or that there was any occasion for inspecting them. There is no evidence that he was doing anything except going to lunch.

SUMMARY OF ARGUMENT.

The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decisions of the Supreme Court of the United States or of any Circuit Court of Appeals. Within the limited scope of this controversy the decision is sustained by legal precedent.

Petitioner's whole case is based entirely on surmise, speculation and conjecture. There was not sufficient pro-

bative evidence from which reasonable inferences might be drawn to justify submitting the case to a jury.

Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another.

There is no evidence as to the condition of the roadbed at the point where deceased is assumed to have gone on the tracks and nothing to indicate there was any occasion for making an inspection. The fact that a foreman of a track gang in a railroad yard has certain general duties to perform raises no presumption that he was performing a particular duty at a given time and place without direct or circumstantial evidence to support reasonable inferences. The assumption by petitioner that deceased went on the track where he was killed to inspect some portion of the roadbed is nothing more than a guess or mere speculation, unsupported by any probative facts.

Whatever may be the general formulation with reference to the standards of proof, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose case is attacked.

When the evidence is such that, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the trial court should direct the verdict. By such direction the result is saved from the mischance of speculation over legally unfounded claims.

ARGUMENT.

The petition for certiorari fails to show any grounds for the granting of the writ. The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decisions of the Supreme Court of the United States or of any Circuit Court of Appeals. Within the limited scope of this controversy the decision is sustained by legal precedent.

Reply to Point (a) Petitioner's Brief 9-11.

Petitioner's whole case is based entirely on surmise, speculation and conjecture. There was not sufficient probative evidence from which reasonable inferences might be drawn to justify submitting the case to a jury.

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan,* 271 U. S. 472, the court said, page 477:

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."

In *Manning* v. *Insurance Co.,* 100 U. S. 693, the court said, page 698:

> "A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption."

In *Looney* v. *Metropolitan R. Co.,* 200 U. S. 480, the court said, page 488:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person

killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

There can be no reasonable assumption that deceased went on the track where he was killed to inspect some portion of the raodbed in the absence of proof of facts and circumstances upon which the assumption might be based. There is no evidence as to the condition of the roadbed at that point and nothing to indicate there was any occasion for making an inspection.

The fact that a foreman of a track gang in a railroad yard has certain general duties to perform raises no presumption that he was performing a particular duty at a given time and place without direct or circumstantial evidence to support reasonable inferences. The assumption by petitioner that deceased went on the track where he was killed to inspect some portion of the roadbed is nothing more than a guess or mere speculation unsupported by any probative facts.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 34, the presumption relied on in that case was supported by evidence that deceased's duties included staying near the north or rear end of the engine as it made its backward movement and that there was "strong evidence" that he was killed approximately at the point where the engine began the backward movement. The court in the *Tennant* case cites with approval the case of *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488.

There is not the slightest similarity between the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, and the case at bar. In that case this court said at page 30:

> "On appeal by respondent, the court below reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no sub-

stantial proof that this negligence was the proximate cause of Tennant's death."

In the *Tennant* case the Circuit Court of Appeals held there was sufficient proof of negligence to present a jury question but that there was no evidence upon which to base the jury's inference as to the causation. In the case at bar the Circuit Court of Appeals sustained the District Court for the reason there was a total failure of proof of negligence (R. 65).

In *Lavender* v. *Kurn,* 327 U. S. 645, there was conflicting evidence on the question of negligence which the jury resolved in favor of the plaintiff. In the case at bar it is not a question of conflicting evidence but a question of no evidence of negligence. The Circuit Court of Appeals did not indulge in any speculation or conjecture as to how the accident happened. The court concluded:

> "In our case, there is no conflict in the evidence. There is a woeful lack of evidence, which would leave a jury to nothing but speculation." (R. 64) (165 Fed. (2d) 806, 809)

In holding that mere speculation should not be allowed to do duty for probative facts, the Circuit Court of Appeals followed the rules laid down by this Court in

Galloway v. *United States,* 319 U. S. 372, 395.
Brady v. *Southern Ry. Co.,* 320 U. S. 476, 480.
Tennant v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 32-33.
Myers v. *Reading Co.,* 331 U. S. 477, 485.

When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the trial court should direct it.

By such direction the result is saved from the mischance of speculation over legally unfounded claims.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 479.

Western & Atlantic RR. v. *Hughes*, 278 U. S. 496, 497.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 478.

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S. 521, 524.

The following are cases reversing judgments, where the verdicts rested on speculation and conjecture:

Atchison, Topeka & Santa Fe Ry. Co. v. *Toops*, 281 U. S. 351, 354-5.

Atchison, Topeka & Santa Fe Ry. Co. v. *Saxon*, 284 U. S. 458, 459.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 478.

New York Central R. Co. v. *Ambrose, Admx.*, 280 U. S. 486, 489.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 480.

Reply to Point (b) Petitioner's Brief 11-13.

There is no evidence that the deceased was in the path of "the engine". Petitioner assumes that he was run over by an engine. No engine is identified. It is wholly a guess as to what ran over the deceased and how it happened. It is conjectured that the deceased "was necessarily in plain sight." There is no proof on which to base such an inference. It is asserted that the engine crew knew or should have known that some section hands or other railroad employees would likely be in proximity to the train but no evidence is pointed out to support this statement. The cases cited under this subdivision have no application

to the case at bar because there was evidence in those cases as to how the accident happened.

The Circuit Court of Appeals did not base its decision on the theory that there was no duty to keep a lookout or give signals. All it said was:

> "As a general proposition, at that position in the yard there was no duty on the defendant to keep a lookout or give signals." (R. 63)

It cited the case of *Toledo, St. Louis & Western Railroad Company* v. *Allen*, 276 U. S. 165, 170-171. Petitioner asserts that this case was overruled by *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54. Petitioner is wrong in that contention. The *Allen* case is cited in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 33. Mr. Justice Frankfurter in a concurring opinion in the *Tiller* case clarified that opinion by saying, page 71:

> "By specific provisions in the Federal Employers' Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established. But it has left undisturbed the other meaning of 'assumption or risk', namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent."

Petitioner asserts that the jury could have found that deceased was in a position where he could have been seen and that no lookout whatever was maintained. There is no evidence in the record which would have justified such a finding. Petitioner's contention emphasizes the importance of the rule laid down in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, where this court said, page 480:

> "By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Reply to Point (c) Petitioner's Brief 13-15.

There is no evidence whatever to support the statement of Petitioner that an assumed train movement was not a switching move. No one knows what kind of a movement was made, by whom or when.

The conclusion of the Circuit Court of Appeals (R. 64) that

> "The evidence that Plitsis did not hear any signal when he was not listening is of no probative force",

is well supported by authorities cited in the court's opinion.

Neither the facts nor the issues in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54, have any application to the case at bar. That case involved the interpretation of the scope of the 1939 amendment to the Federal Employers' Liability Act with reference to the question of assumption of risk.

CONCLUSION.

The only reason assigned for the allowance of the writ is the assertion that the Circuit Court of Appeals decided an important question of Federal law in a way probably in conflict with the applicable decisions of the Supreme Court of the United States and those of other Circuit Courts of Appeals. The Circuit Court of Appeals simply applied the law as laid down in the decisions of this Court to the evidence appearing in the record. Its opinion shows that it gave careful consideration to the cases relied on by petitioner.

There is no basis for the petition other than an effort to have this court review the judgments of the District Court and the Circuit Court of Appeals. This case does not present important questions of Federal law which have not, but should be, settled by this Court. The judgment of the District Court and its affirmance by the Circuit Court of Appeals were fully in accord with the principles of law laid down by this Court.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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